

***Amicus curiae* of the United Nations High Commissioner for Refugees  
on the doctrine of imputed political opinion and risk assessments in the context  
of persons fleeing conflict and violence**

**I. UNHCR's mandate and role<sup>1</sup>**

1. The Office of the United Nations High Commissioner for Refugees (hereafter “UNHCR”) has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, seek permanent solutions for refugees.<sup>2</sup> According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [...]”<sup>3</sup> This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”).<sup>4</sup>
2. UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78 (1) of the *Treaty on the Functioning of the European Union* (“TFEU”),<sup>5</sup> as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees [...] on matters relating to asylum policy.”<sup>6</sup> Secondary EU legislation also emphasizes the role of UNHCR. For instance, Recital 22 of the Council Directive 2011/95/EU states that consultations with UNHCR “*may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.*”<sup>7</sup> The supervisory responsibility of UNHCR is also specifically articulated in the Council Directive 2013/32/EU which obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.”<sup>8</sup>

---

<sup>1</sup> This *amicus curiae* does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. See, UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

<sup>2</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), <http://www.refworld.org/docid/3ae6b3628.html>.

<sup>3</sup> *Ibid*, para. 8(a).

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, <http://www.refworld.org/docid/3be01b964.html>, p. 137. According to Article 35 (1) of the 1951 Convention, UNHCR has the “*duty of supervising the application of the provisions of the Convention*”.

<sup>5</sup> European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

<sup>6</sup> European Union, *Declaration on Article 73k of the Treaty Establishing the European Community*, OJ C 340/134, 10 November 1997, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17: EN:HTML>.

<sup>7</sup> European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)*, 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html> (hereafter the “Qualification Directive”).

<sup>8</sup> Article 29(c), Asylum Procedures Directive (recast): European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)*, 29 June 2013, OJ L 180/60-180/95; 29.6.2013, 2013/32/EU, <http://www.refworld.org/docid/51d29b224.html>.

3. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention.<sup>9</sup> UNHCR also provides information on a regular basis to decision-makers and courts of law concerning the proper interpretation and application of the provisions within the 1951 Convention.
4. UNHCR has a history of third party interventions in many national and regional jurisdictions. The Office is often approached directly by courts or other interested parties to obtain UNHCR's views on particular legal issues. UNHCR has, for example, been granted intervener status by the European Court of Human Rights and the Court of Justice of the European Union, and various domestic courts, such as the US Supreme Court, the Supreme Court of Norway, the Supreme Court of the United Kingdom (as well as the former House of Lords), the German Federal Constitutional Court and the Supreme Court of Canada.
5. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention in Sweden as part of its supervisory responsibility, and submits this *amicus curiae* brief in case number UM 1970-17 to provide neutral and expert information on the interpretation of the international refugee law concepts before it. This does not constitute a recommendation on the merits of the case in question. Nonetheless, it is important to place the legal issues in context.
6. This case concerns a Syrian asylum-seeker who based his claim for international protection on the following:
  - Having completed his military service, he feared being called back as a reservist and forced to participate in the war;
  - He feared persecution by the Free Syrian Army (FSA), which controls his hometown of Douma (Rural Damascus Governorate) due to his refusal to fight with them. The FSA accused him of supporting the Government. His house was burned down and he was forced to leave Douma;
  - He was arrested and mistreated by Government forces in Al Maza and accused of providing goods to anti-government armed groups.
7. The applicant was granted subsidiary protection by the Swedish Migration Agency (SMA). That decision was subsequently appealed and the Migration Court granted him refugee status.
8. The Court found on the basis of relevant COI that persons originating from areas that are currently or were previously under the control of the Free Syrian Army, are at risk of being perceived as political opponents and/or enemies by the Government regime. Therefore, it was found that applicants originating from opposition-controlled areas have an anti-government political opinion attributed to them and thus have a well-founded fear of persecution.

## II. Key questions addressed in this submission

---

<sup>9</sup> Such guidelines are included in the UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, and complementary Guidelines on International Protection, December 2011, HCR/1P/4/ENG/REV. 3, <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (hereafter "UNHCR Handbook").

9. The present case concerns the interpretation of relevant provisions of the Swedish Aliens Act, namely Chapter 4, Section 1 and 2 of the Act, which are based on the 1951 Convention and the Qualification Directive.<sup>10</sup>
10. The Migration Court of Appeal has been asked by the Swedish Migration Agency, to clarify the circumstances in which a person who has left Syria can be said to have a well-founded fear of persecution based on a political opinion being attributed to them, and thereby regarded as an opponent of one of the parties to the conflict. The Swedish Migration Agency has further stated that the clarification is needed particularly in view of the differences in rights attached to the two different statuses (see paragraph 17 below).
11. UNHCR will in this *amicus curiae* analyze two key concepts, namely, imputed political opinion as well as the concept of individualized risk or differentiation of risk in the context of persons fleeing conflict and violence.
12. UNHCR submits that Contracting States are obliged under the 1951 Convention to recognize asylum-seekers who can establish that they have a well-founded fear of persecution on account of one or several of the Convention grounds as Convention refugees. This includes persons who have a well-founded fear of persecution on account of their imputed or perceived Convention ground(s), such as an imputed political opinion. Moreover, an interpretation of the refugee definition endorsing the view that refugees fleeing persecution in situations of armed conflict and violence are to be treated as “victims of indiscriminate violence” and granted subsidiary protection is at variance with State obligations under the 1951 Convention.

### III. Refugee Status Determination Procedure in Sweden

13. The Refugee Status Determination (hereafter “RSD”) process in Sweden and the basic provisions concerning the right of aliens to enter and to remain in Sweden are laid down in the Aliens Act (Utlänningslagen, 2005:716).<sup>11</sup> The provisions of the Aliens Act are based on the 1951 Convention and the Qualification Directive<sup>12</sup> which recognizes that the 1951 Convention is “*the cornerstone of the international legal regime for the protection of refugees.*”
14. The Qualification Directive obliges Sweden to apply a sequential approach to the assessment of applications for international protection. The sequential approach requires that claims related to a situation of armed conflict and violence must first be assessed in accordance with the criteria for refugee protection. Only when the applicant does not qualify for refugee status the claim should be assessed in accordance with the criteria for subsidiary protection.<sup>13</sup> UNHCR wishes to highlight

---

<sup>10</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, <http://www.refworld.org/docid/51d29b224.html>.

<sup>11</sup> The Swedish Aliens Act: [http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag\\_2005716\\_sfs-2005-716](http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag_2005716_sfs-2005-716).

<sup>12</sup> Act amending the Aliens Act (2005:716), SFS 2009:1542: <https://beta.lagrummet.se/rinfo/publ/sfs/2009:1542>.

<sup>13</sup> UNHCR, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, September 2012, <http://www.refworld.org/docid/50474f062.html>. See also *H. N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, European Union: Court of Justice of the European Union, 8 May 2014, para. 35, <http://www.refworld.org/docid/5375e84f4.html>.

that subsidiary protection is “complementary and additional to the refugee protection enshrined in the Geneva Convention.”<sup>14</sup>

15. According to Section 1, Chapter 4 (Refugees and others in need of protection) of the Aliens Act, the term “refugee” refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group, and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. The provision makes no distinction as to whether the persecution is at the hands of the authorities of the country, or persecution by private individuals when the authorities cannot protect against such.
16. Section 2 (Subsidiary protection/alternative protection)<sup>15</sup>, in Chapter 4 of the Act provides that “[A]n alien in need of subsidiary protection means, *inter alia* a person who, upon return to his or her country of nationality, will be at risk of being sentenced to death or subjected to corporal punishment, or of being exposed to torture or other inhuman or degrading treatment or punishment, or runs – as a civilian – a serious and personal risk of harm because of generalized violence in situations of external or internal armed conflict” cf. to Section 2, subclause 1.
17. The Temporary Law 2016:752,<sup>16</sup> which entered into effect on 20 June 2016 and amends the Aliens Act, stipulates that “persons in need of alternative protection” are to be granted temporary residence permits valid for 13 months which can be renewed for an additional period of two years. Convention refugees are, as a general rule, to be granted three-year residence permits with the possibility of extension. The former category, with some limited exceptions, does not have the right to family reunification.

#### IV. The relevant principles of international refugee law

##### **Article 1A (2) of the 1951 Refugee Convention**

18. Article 1A(2) of the 1951 Convention defines a refugee as a person who:  
[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

---

<sup>14</sup> Recital 33 of the Qualification Directive: European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)*, 29 June 2013, OJ L. 180/60-180/95; 29.6.2013, 2013/32/EU, <http://www.refworld.org/docid/51d29b224.html>.

<sup>15</sup> The Swedish Aliens Act, Chapter 4, Section 2 transposes Art. 15 a-c of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast Qualification Directive), <http://www.refworld.org/pdfid/4f197df02.pdf>. Alternative protection is also referred to as a form of subsidiary protection.

<sup>16</sup> Law 2016:752 om tillfälliga begränsningar att få uppehållstillstånd i Sverige, [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/laq-2016752-om-tillfalliga-begransningar-av\\_sfs-2016-752](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/laq-2016752-om-tillfalliga-begransningar-av_sfs-2016-752).

19. To be a refugee, a person must satisfy the above definition, which forms the positive basis upon which the determination of refugee status is made. The Convention ground concerned must be a relevant contributing factor, though it need not be the sole, or dominant, cause.<sup>17</sup>
20. UNHCR further notes that the Convention affords equal protection to all Convention grounds. Moreover, the grounds of persecution are not mutually exclusive since an applicant may be eligible for refugee status under more than one of the grounds identified in Article 1A(2).<sup>18</sup> For example, conscientious objectors, or a category of conscientious objectors defined by reference to their moral or political belief or opinion, may, for the purposes of the 1951 Convention, be construed as a “particular social group”, defined as such, by some characteristic, attribute, activity, belief, interest or goal that unites its group members.<sup>19</sup> Military personnel or reservists who object to performing military service or duties could also be said to risk persecution on account of their political opinion, be it actual or imputed (e.g. young men who criticize the government’s military policy, men who reject recruitment attempts from non-State armed groups thus conveying oppositional sentiments against those parties,<sup>20</sup> or persons who refuse to engage in military actions that violate basic rules of human conduct).<sup>21</sup>

### ***The doctrine of imputed political opinion under the 1951 Convention and the Qualification Directive***

21. The starting point to address the doctrine of imputed political opinion is the 1951 Convention and the Qualification Directive (recast). Under the Convention ground of political opinion, a claimant must show<sup>22</sup> that he or she has a well-founded fear

---

<sup>17</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, para. 20, <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, (hereafter “GIP No.1-Gender”).

<sup>18</sup> UNHCR *Handbook*, page 92. See also UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service Within the Context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, 3 December 2013, <http://www.refworld.org/docid/529ee33b4.html>, para. 47 (hereafter “GIP No.10 – Military Service”).

<sup>19</sup> See UNHCR *Handbook*, para. 77 which states: A “particular social group” normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality. The UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, <http://www.refworld.org/docid/3d36f23f4.html> (hereafter “GIP No. 2 – MPSTG”) provides the following definition: “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”, at para. 11.

<sup>20</sup> UNHCR *Handbook*, at paras. 167-174.

<sup>21</sup> A further example illustrating the overlap of Convention grounds is that of a claimant who claims risk of persecution because of their refusal to wear traditional clothing. Depending on the particular circumstances of the society, the asylum-seeker may be able to establish a claim based on political opinion (if the conduct is viewed by the State as a political statement that it seeks to suppress), religion (if the conduct is based on a religious conviction opposed by the State) or membership in a particular social group. See UNHCR, GIP No. 2 – MPSTG.

<sup>22</sup> See UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, <http://www.refworld.org/docid/3ae6b3338.html>, which clarifies that the burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached. In view of the particularities of a refugee’s situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.

of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because the holding of such opinions has been attributed to him or her.<sup>23</sup> The refugee definition does not require applicants to describe their beliefs as political for their convictions to be considered political opinions for purposes of protection provided by the 1951 Convention. In UNHCR's view, the concept of political opinion should be understood in a broad sense, to incorporate "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged".<sup>24</sup>

22. UNHCR highlights that the Swedish Aliens Acts transposes the Qualification Directive (recast), and the Directive expressly protects those persecuted because of the characteristics listed in Articles 2(d) and 10(1) of the Directive whether or not they actually have the characteristic, provided it is "attributed to the applicant [for international protection] by the actor of persecution" (Article 10(2)). In the case of political opinion, Article 10(1)(e) expressly protects those persecuted because they have a political opinion, whether or not they have acted upon that opinion:

Art 10(1)(e) QD, according to which a political opinion can give rise to reasons for persecution, "whether or not that opinion [...] has been acted upon by the applicant."

Art 10(2) QD provides:

"2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic **is attributed to the applicant** by the actor of persecution." [emphasis added]

23. The concept of imputed political opinion has been analyzed by a number of the highest national courts around the world, starting with the Supreme Court of Canada which held in *Canada (Attorney General) v. Ward* that the political opinion at issue need not have been expressed outright, it can be perceived or imputed. As well, it need not necessarily conform to the claimant's true beliefs. What is relevant is the perception of the persecutor.<sup>25</sup>
24. Similarly, the United States Court of Appeals for the Ninth Circuit held in *Mario Ernesto Navas v. Immigration and Naturalization Service* that asylum-seekers "can

---

<sup>23</sup> However, the refugee definition does not require applicants to describe their beliefs as political for their convictions to be considered political opinions for purposes of protection provided by the 1951 Convention. Moreover, it also includes political neutrality or not having a political opinion. See *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, [http://www.refworld.org/cases/UK\\_SC\\_500fdacb2.html](http://www.refworld.org/cases/UK_SC_500fdacb2.html), where the court found that the right to not hold a political opinion is equally important. "I can see no basis in principle for treating the right to hold and not to hold political beliefs differently. Article 10 of the ECHR provides that everyone has the right to freedom of expression and that this right 'shall include freedom to hold opinions'. That must include the freedom not to hold opinions." At para 36.

<sup>24</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 74 (3rd ed. 2007), at p. 87. See also, UNHCR, GIP No.1- Gender, para. 32 and UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, 2 December 2016, <http://www.refworld.org/docid/583595ff4.html>, (hereafter "GIP No. 12 - Conflict and Violence") at para. 38.

<sup>25</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do>, at p.746-747.

establish persecution on account of imputed political opinion, that is, on account of a political opinion attributed to him or her by the persecutors.”<sup>26</sup>

25. The Supreme Court of the United Kingdom addressed the issue and found: “the principle is not in doubt that an individual may be at risk of persecution on the grounds of imputed opinion”.<sup>27</sup> More recently, the United Kingdom Upper Tribunal (Immigration and Asylum Chamber) concluded in *MSM (Somalia) v. Secretary of State for the Home Department* that the words of Article 10(1) (e) of the Qualification Directive i.e. “*The concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant, [...] embrace the twin concepts of actual and imputed political opinion.* Both are protected.”<sup>28</sup>
26. In situations of armed conflict and violence, expressing objections or taking a neutral or indifferent stance to the strategies, tactics or conduct of parties or refusing to join, support, financially contribute to, take sides or otherwise conform to the norms and customs of the parties involved in the situation may – in the eyes of the persecutor – be considered critical of the political goals of the persecutor, or as deviating from the persecutor’s religious or societal norms or practices. As such, such actions or lack thereof might indicate or create the perception in the eyes of the persecutor that the person holds a different political opinion, religious (or non)belief, or affiliation with or belonging to an ethnic or social group.<sup>29</sup>

### ***Military service objectors and imputed political opinion***

27. The applicant in the case at hand has previously served in the Syrian Armed Forces and fears that as a reservist he will be called back to military service and forced to participate in the war or that he will be persecuted by the Free Syrian Army as he refused to join and fight for them. The Migration Court accepted the applicant’s account and concluded that he will be at risk of persecution on account of imputed political opinion.
28. As stated above, the ground of political opinion is broader than affiliation with a particular political movement or ideology and covers both the holding of an actual political opinion and its expression, political neutrality, as well as cases where a political opinion is imputed to the applicant even if he or she does not hold that view. The latter can arise in cases where the State, or a non-State armed group, attributes to the individual a particular political view.<sup>30</sup>

---

<sup>26</sup> *Mario Ernesto Navas v. Immigration and Naturalization Service*, 98-70363, United States Court of Appeals for the Ninth Circuit, 20 June 2000, [http://www.refworld.org/cases\\_USA\\_CA\\_9\\_4152e0fb15.html](http://www.refworld.org/cases_USA_CA_9_4152e0fb15.html).

<sup>27</sup> *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, [http://www.refworld.org/cases\\_UK\\_SC\\_500fdacb2.html](http://www.refworld.org/cases_UK_SC_500fdacb2.html). In addition to the discussion around imputed political opinion, the court found that the right to not hold a political opinion is equally important. “I can see no basis in principle for treating the right to hold and not to hold political beliefs differently. Article 10 of the ECHR provides that everyone has the right to freedom of expression and that this right ‘shall include freedom to hold opinions’. That must include the freedom not to hold opinions.” *Ibid.*, para. 36.

<sup>28</sup> *MSM (journalists; political opinion; risk) Somalia v. Secretary of State for the Home Department*, [2015] UKUT 00413 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 30 July 2015, [http://www.refworld.org/cases\\_GBR\\_UTIAC\\_55ba10194.html](http://www.refworld.org/cases_GBR_UTIAC_55ba10194.html) at para. 33.

<sup>29</sup> UNHCR, GIP No. 12 – Conflict and Violence, at para. 37.

<sup>30</sup> UNHCR, GIP No. 10 – Military Service, para. 51.

29. Asylum cases involving objection to military service may be decided on the basis that there is a nexus with the political opinion ground in the 1951 Convention. Depending on the facts, an objection to military service are to be viewed through the prism of actual or imputed political opinion. In relation to the latter, the authorities may interpret the individual's refusal to participate in a conflict as a manifestation of political disagreement with its policies. The act of desertion or evasion may in itself be, or be perceived to be, an expression of political views.<sup>31</sup>
30. In light of the foregoing, UNCHR is of the view that applications for international protection based on objection to military service can be founded on both the applicant's actual political or imputed political opinion.

### ***Individual and group-based risks***

31. In accordance with the ordinary meaning to be given to the terms and in light of the context as well as the object and purpose of the 1951 Convention, Article 1A(2) applies to persons fleeing situations of armed conflict and violence. Indeed, the 1951 Convention definition of a refugee makes no distinction between refugees fleeing peacetime or "wartime" persecution. The analysis required under Article 1A(2) focuses on a well-founded fear of being persecuted for one or more of the Convention grounds.<sup>32</sup>
32. In situations of armed conflict and violence, an applicant may be at risk of being singled out or targeted for persecution. Equally, in such situations, entire groups or populations may be at risk of persecution, leaving each member of the group at risk.<sup>33</sup> The fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim,<sup>34</sup> nor is the size of the group relevant. The test is whether an individual's fear of being persecuted is well-founded. At times, the impact of a situation of armed conflict and violence on an entire community, or on civilians more generally, strengthens rather than weakens the well-founded nature of the fear of being persecuted of a particular individual.<sup>35</sup>
33. In situations of armed conflict and violence, whole communities may be affected by, and be at risk from, aerial bombardments, the use of cluster munitions, barrel bombs or chemical weapons, artillery or sniper fire, improvised explosive devices, landmines, car bombs or suicide bombers, or siege tactics, for example. Exposure to such actions can amount to persecution within the meaning of Article 1A(2) of the 1951 Convention, either independently or cumulatively.
34. In UNHCR's view, the fact that the violence prevailing in a country is generalized and indiscriminate in nature is often erroneously used against finding a nexus to a 1951 Convention ground. However, as noted by leading refugee law scholar Guy S. Goodwin-Gill and his co-author Jane McAdam in *The Refugee in International Law*, the logic of denying refugee status to those affected by a conflict which itself

---

<sup>31</sup> UNHCR, GIP No. 10 – Military Service, para. 52.

<sup>32</sup> UNHCR, GIP No. 12 - Conflict and Violence, para. 10.

<sup>33</sup> *Ibid.*, para. 17.

<sup>34</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, <http://www.refworld.org/docid/3b20a3914.html>, para. 20.

<sup>35</sup> UNHCR, GIP No. 12 – Conflict and Violence, at para. 17. According to the European Court of Human Rights: "in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion"; *F.G. v Sweden*, Application No. 43611/11, Council of Europe: European Court of Human Rights, 23 March 2016, <http://www.refworld.org/docid/56fd485a4.html>, para. 126.



engages or is driven by one or other Convention ground is unclear and may lead to absurd situations.<sup>36</sup> To illustrate why such an approach is flawed, the authors provide the example of an armed conflict and violence which becomes genocidal, and where, according to the logic above, no persons would be eligible for refugee status.<sup>37</sup>

### **No differential risk required under the 1951 Convention**

35. In UNHCR's view, the refugee definition does not require a differential risk or impact. In other words, it does not require that the applicant fleeing a situation of armed conflict and violence establish a risk of harm over and above that of others similarly situated (sometimes called a "differential test").<sup>38</sup> Such an approach is erroneous since it fails to acknowledge that persons may be forced to flee on account of a well-founded fear of persecution for Convention reasons in war or conflict situations and that war and violence are themselves used as instruments of persecution to repress or eliminate specific groups or categories of persons.<sup>39</sup>
36. Moreover, it is essential that a claimant's risk of being persecuted in the country of origin is assessed in the context of the situation there, taking into consideration aspects of the individual's profile, experiences and activities.<sup>40</sup>
37. The intent or motive of the persecutor can be a relevant factor in establishing the causal link between the fear of persecution and a 1951 Convention ground. However, the intent or motive of the persecutor is not necessary or decisive, not least because it is often difficult to establish, in particular in situations of armed conflict and violence. A causal link may also be established by the strategies, tactics or means and methods of warfare of the persecutor, by the inability or unwillingness of the state to provide protection, or by the effect(s) of the situation of armed conflict and violence. The question to guide decision-makers is: do the reasons for the person's feared predicament, within the overall context of the country, relate to a Convention ground?<sup>41</sup>
38. Situations of armed conflict and violence may be rooted in, motivated or driven by, and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides, or may impact people based on these factors. In fact, what may appear to be indiscriminate conduct (i.e. conduct whereby the persecutor is not seeking to target particular individuals), may in reality be aimed at whole communities or areas whose inhabitants are actual or perceived supporters of one of the sides in the situation of armed conflict and violence. Rarely are modern-day situations of armed conflict and violence characterised by violence that is not in one way or another aimed at particular populations, or which does not have a disproportionate effect on a particular population, establishing a causal link with one

---

<sup>36</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 74 (3rd ed. 2007), p. 128.

<sup>37</sup> *Ibid.*

<sup>38</sup> UNHCR, GIP No. 12 – Conflict and Violence, para. 22.

<sup>39</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, <http://www.refworld.org/docid/3b20a3914.html>, at para. 20. See also *Australia High Court, Minister for Immigration and Multicultural Affairs v. Ibrahim*, 26 October 2000, [2000] HCA 55, paragraphs 196-199 (Kirby J.); Federal Court of Australia, *MIMA v. Abdi*, 26 March 1999, [1999] 87 FCR 280.

<sup>40</sup> UNHCR, GIP No. 12 - Conflict and Violence, paras 11-12. See also UNHCR Handbook, para. 42.

<sup>41</sup> UNHCR, GIP No. 12 - Conflict and Violence, para. 32. See also, Refugee Appeal No. 72635/01, 72635/01, New Zealand: Refugee Status Appeals Authority, 6 September 2002, <http://www.refworld.org/docid/402a6ae14.html>, para. 168, also J. C. Hathaway and M. Foster, *The Law of Refugee Status* (Cambridge University Press, 2014), pp. 376-379.

or more of the Convention grounds. Who belongs to or is considered or perceived to be affiliated with, a particular side in a situation of armed conflict and violence, is often interpreted broadly by actors during such situations– and may include a range of people, including family members of fighters as well as all those who belong to the same religious or ethnic groups or reside in particular neighbourhoods, villages or towns. A Convention ground is regularly imputed to groups of people based on their family, community, geographic or other links.<sup>42</sup>

39. An approach recommending a high level of individualization of the threat irrespective of the characteristics of the underlying conflict will most likely fail to acknowledge that the general situation in the country of origin forms part of the risk assessment. It appears to also conflate the risk element with the requirement of a well-founded fear of being persecuted for a 1951 Convention ground.<sup>43</sup> The greater the level of violence in a country, the more likely that one who has received threats, or whose family members have been threatened, will actually be persecuted.
40. UNHCR is of the view that the test of "differential impact" finds no support in the text of the Convention and it should not be followed. It is not the degree or differentiation of risk that determines whether a person caught in a conflict is a refugee under the Convention definition.<sup>44</sup> Threats to life or freedom and other serious human rights violations constitutes persecution for the purposes of the 1951 Convention refugee definition. No higher level of severity or seriousness of the harm is required for the harm to amount to persecution in situations of armed conflict and violence compared to other situations, nor is it relevant or appropriate to assess whether applicants would be treated any worse than what may ordinarily be "expected" in situations of armed conflict and violence.<sup>45</sup>
41. To summarize, there is no basis in the text of the 1951 Convention for holding that a person fleeing conflict and violence can prove persecution only when he or she can establish a risk of harm over and above those who are similarly situated. This would not be in line with a proper application of the 1951 Convention definition.<sup>46</sup>

### ***Persons fleeing conflict and violence in Syria***

42. UNHCR acknowledges the difficulties decision-makers encounter in determining whether harm inflicted in situations of conflict and violence amounts to persecution or has been carried out for a Convention reason. In this respect, UNHCR draws attention to its country-specific guidance for assessing the international protection needs of asylum-seekers from Syria, which provides pertinent and detailed analysis

---

<sup>42</sup> UNHCR, GIP No. 12 - Conflict and Violence, para. 33.

<sup>43</sup> UNHCR, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, September 2012, PPLA/2012/05, <http://www.refworld.org/docid/50474f062.html>.

<sup>44</sup> *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, Australia: High Court, 26 October 2000, [http://www.refworld.org/cases,AUS\\_HC,3deb737f7.html](http://www.refworld.org/cases,AUS_HC,3deb737f7.html).

<sup>45</sup> The risk of harm as a result of exceptionally high levels of violence to the general population was addressed by the European Court of Human Rights in, *inter alia*, *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011, <http://www.refworld.org/docid/4e09d29d2.html> and *L.M. and Others v. Russia*, Applications nos. 40081/14, 40088/14 and 40127/14, Council of Europe: European Court of Human Rights, 15 October 2015, <http://www.refworld.org/docid/561f770f4.html>. For a discussion of the relevant criteria to assess the intensity of a conflict, see: AM & AM (Armed Conflict: Risk Categories) Somalia v. Secretary of State for the Home Department, [2008] UKAIT 00091, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 27 January 2009, <http://www.refworld.org/docid/4934f7542.html>. See also, UNHCR, GIP No. 12 – Conflict and Violence, paras. 17-18.

<sup>46</sup> UNHCR, GIP No. 12 – Conflict and Violence, para. 23.

on how to assess those needs.<sup>47</sup> A core function of the guidance is to assist the decision-maker with the correct interpretation and application of the legal concepts. Noting that UNHCR's guidance is based on in-depth research on a broad range of sources of country of origin information (COI) rigorously reviewed for reliability, UNHCR encourages the Swedish authorities and the judiciary to carefully consider the information provided below so as to ensure a consistent approach to decision-making that is in line with international refugee law.

43. UNHCR considers that most Syrian nationals seeking international protection are likely to fulfil the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention, since they will have a well-founded fear of persecution linked to one of the Convention grounds. In particular, Syrian nationals, who hold, or who are perceived to hold, an anti-government political opinion in the broadest sense are considered to be at risk of (have a "well-founded fear" of) persecution at the hands of the government. Political opinion (or imputed political opinion) constitutes a Convention ground in the sense of the 1951 Refugee Convention ("*for reasons of [...] political opinion*"). The nexus to a 1951 Convention ground will lie in the direct or indirect, real or perceived association with one of the parties to the conflict. Only in exceptional cases will asylum-seekers from Syria not meet the criteria of the refugee definition in the 1951 Convention.<sup>48</sup>
44. Where claims of asylum-seekers who have fled Syria are considered on an individual basis in accordance with established asylum or refugee status determination procedures, UNHCR considers that profiles such as persons opposing or perceived to be opposing the government, persons supporting or perceived to be supporting the government, persons opposing, or believed to oppose, ISIS in areas under its *de facto* control or influence, or a combination thereof, and depending on the particular circumstances of the individual case, are likely to be in need of international protection in the sense of the 1951 Convention, unless, of course, exclusion clauses were to apply.<sup>49</sup> Where relevant, particular consideration needs to be given to any past persecution to which applicants for international protection may have been subjected.<sup>50</sup>
45. One particular feature of the conflict in Syria that decision-makers must take into account is that the different parties to the Syrian conflict frequently impute a political opinion to larger groups of people, including whole towns, villages or neighborhoods, by association. As such, members of a larger entity, without individually being singled out, become the targets for reprisals by different actors, including government forces, ISIS, and anti-government armed groups, for reason of real or perceived support to another party to the conflict. According to consistent reports, whole communities that are perceived to be holding a particular political opinion or affiliation in relation to the conflict are targeted by aerial bombardments, shelling, siege tactics, suicide attacks and car bombs, arbitrary arrest, hostage-taking, torture, rape and other forms of sexual violence, and extra-judicial

---

<sup>47</sup> UNHCR, *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic*, Update IV, November 2015, <http://www.refworld.org/docid/5641ef894.html>.

<sup>48</sup> UNHCR, *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic*, Update IV, November 2015, <http://www.refworld.org/docid/5641ef894.html>, para. 36. See also UNHCR, *Relevant Country of Origin Information to Assist with the Application of UNHCR's Country Guidance on Syria: "Illegal Exit" from Syria and Related Issues for Determining the International Protection Needs of Asylum-Seekers from Syria*, February 2017, <http://www.refworld.org/docid/58da824d4.html>.

<sup>49</sup> See list of risk profiles in: *Ibid.*, para. 38.

<sup>50</sup> *Ibid.*

executions. The perception of sharing a political opinion or affiliation in relation to the conflict is often based on little more than an individual's physical presence in a particular area (or the fact that he/she originates from a particular area), or his/her ethnic, religious or tribal background. The risk of being harmed is serious and real, and in no way diminished by the fact that the person concerned may not be targeted on an individual basis.<sup>51</sup>

46. Independent observers note that draft evasion is likely considered by the government as a political, anti-government act,<sup>52</sup> which may lead to punishment of the person who attempted to evade the draft beyond the relevant sanctions for the criminal offence of draft evasion,<sup>53</sup> including harsher treatment during arrest, interrogation, detention and, once deployed, during military service.<sup>54</sup> In practice,

<sup>51</sup> *Ibid*, para. 17.

<sup>52</sup> "My assessment would be that the government applies sanctions against individuals that fail to comply with their military service obligation based upon two main factors, which could be simultaneous or consecutive depending upon the circumstances. The government primarily appears to treat draft evasion as a criminal matter subject to sanctions by law. In reality, the government displays limited interest in applying the applicable legal sanctions on draft-dodgers given its continued need for manpower. Instead, its preference for dealing with these individuals appears to be rapid conscription into their mandated term of military service rather than long-term imprisonment – even for individuals that reside in area previously controlled by opposition groups. Thus, most draft-dodgers would likely not enter the court system for an extended period of time. The terms of this conscription nonetheless remain harsh with reports of near-imprisonment on military bases and minimal training prior to frontline deployment. The government also holds the simultaneous view of draft evasion as a political or 'anti-government' activity subject to sanctions - both official and unofficial. Draft-dodgers can face torture and other forms of ill-treatment while being held in detention as well as ill-treatment by military officers and other officials during their mandatory military service. The sanctions can also include state harassment and other potential repercussions for their family members. The government likely intends to impose further long-term consequences on draft-dodgers in the future if pro-government forces manage to reestablish countrywide stability – including arrest, torture, forced disappearances, limited access to public services, and harassment or enhanced monitoring by state intelligence services" (emphasis added); E-mail communication with Christopher Kozak, Syria Research Analyst at the ISW, 24 May 2017 (e-mail on file with UNHCR). "Syrian officials frequently view draft dodgers and those unwilling to serve in the military as a sign of opposition and subversion"; E-mail communication with Joshua Landis, Director Center for Middle East Studies and Associate Professor, University of Oklahoma, University of Oklahoma, 22 May 2017 (e-mail on file with UNHCR). "(...) based on interviews I've conducted and testimonies I've reviewed, I would feel comfortable saying that draft evasion is considered anti-government activity by the government. This is particularly the case for men who have traveled abroad without the permission of the government (i.e., have not left through legal means). Men who have left legally would have gone through a formal border and obtained a military postponement because they have a verified excuse such as study or work that takes them abroad" (emphasis added); E-mail communication with Rochelle Davis, Associate Professor of Cultural Anthropology, Georgetown University, 22 May 2017 (e-mail on file with UNHCR). "(...) based on my understanding of the conditions in Syria and in particular practices around military service, I would consider it reasonable to say that draft evasion is considered an "anti-government" act by the authorities that is punishable in a number of ways, including through arbitrary arrest, incommunicado detention, torture and ill-treatment" (emphasis added); E-mail communication with Lama Fakhri, Deputy Director, Middle East and North Africa Division, Beirut Director, HRW, 22 May 2017 (e-mail on file with UNHCR). See also, UNHCR, *Relevant Country of Origin Information to Assist with the Application of UNHCR's Country Guidance on Syria: "Illegal Exit" from Syria and Related Issues for Determining the International Protection Needs of Asylum-Seekers from Syria*, February 2017, <http://www.refworld.org/docid/58da824d4.html>, p. 20.

<sup>53</sup> "The Convention ground [here: political or imputed political opinion] needs only to be a contributing factor to the well-founded fear of persecution; it need not be shown to be the dominant or even the sole cause" (emphasis added); UNHCR, GIP No. 10 – *Military Service*, para. 47.

<sup>54</sup> The government's view that draft evasion constitutes a political or anti-government activity "can be reflected in particularly harsh treatment of draft-dodgers by military officers and other officials during their detention or mandatory military service as well as state harassment and other potential repercussions for their family members"; E-mail communication with Christopher Kozak, Syria Research Analyst at the ISW, 22 May 2017 (e-mail on file with UNHCR). "I've heard reports that conscripted draft-dodgers can face perceptions of treasonous and anti-government behavior from military officers and other officials"; E-mail communication with Christopher Kozak, Syria Research Analyst at the ISW, 18 May 2017 (e-mail on file with UNHCR). "The intent or motive of the persecutor

rather than facing criminal sanctions (imprisonment) under the Military Penal Code, draft evaders are reportedly deployed to a frontline position within days or weeks of their arrest, often with only minimal training.<sup>55</sup>

## V. Conclusions

47. UNHCR submits that Contracting States are obliged under the 1951 Convention to recognize asylum-seekers who can establish that they have a well-founded fear of persecution on account of one or several of the Convention grounds as Convention refugees, instead of granting such persons subsidiary protection. This includes persons who have a well-founded fear of persecution on account of their imputed or perceived Convention ground(s), such as an imputed political opinion.
48. An interpretation of the refugee definition endorsing the view that refugees fleeing persecution from conflict are to be treated as “victims of indiscriminate violence” and granted subsidiary protection is at variance with State obligations under the 1951 Convention.
49. UNHCR submits that the legal tests under Chapter 4 of the Aliens Act which incorporates the 1951 Convention and transposes the Qualification Directive must be construed to reflect an emphasis on an individualized inquiry, rather than placing decisive weight on the general country conditions and the level of indiscriminate violence. UNHCR observes that a finding of personal risk is essential before proceeding to determine whether the risk is faced generally in the country in question.
50. UNHCR further submits that a correct and purposive interpretation of the 1951 Convention requires that the above mentioned legal provisions must be interpreted in a manner which does not curtail or restrict the scope of protection granted to persons fleeing situations of armed conflict and violence.<sup>56</sup> UNHCR reiterates in this respect that the 1951 Convention makes no distinction between refugees fleeing peacetime or conflict situations and further, the impact of a conflict on an entire community can strengthen, rather than weaken, the risk to any particular individual.<sup>57</sup>

UNHCR  
11 August 2017

---

*can be a relevant factor in establishing the causal link between the fear of persecution and a Convention ground but it is not decisive, not least because it is often difficult to establish”*; UNHCR, GIP No. 10 – Military Service, para. 48.

<sup>55</sup> The New Arab, *Damascus Life Isn't 'Business-as-Usual', Whatever Assad Says*, 14 March 2017, <http://bit.ly/2mow7Zp>; US Department of State, *2016 Country Reports on Human Rights Practices – Syria*, 3 March 2017, <http://www.refworld.org/docid/58ec89bf13.html>, p. 21. See also sources included in: UNHCR, *Relevant Country of Origin Information to Assist with the Application of UNHCR's Country Guidance on Syria: "Illegal Exit" from Syria and Related Issues for Determining the International Protection Needs of Asylum-Seekers from Syria*, February 2017, <http://www.refworld.org/docid/58da824d4.html>, pp. 20, 22.

<sup>56</sup> UNHCR, *Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration*; Roundtable 15 and 16 October 2013, Montevideo, Uruguay, 7 July 2014, <http://www.refworld.org/docid/53c52e7d4.html>.

<sup>57</sup> See UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence*, Roundtable 13 and 14 September 2012, Cape Town, South Africa, <http://www.refworld.org/docid/50d32e5e2.html>.